No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent,

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF PAUL MARX AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OP RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of the parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Professor Paul Marx, PhD and Catholic priest gave up practically all teaching about 30 years ago, and since has worked a 60 hour week, publishing appropriate documents and traveling rèpeatedly to discuss respect for human life.

POINT OF POSSIBLE INTEREST

Many amici are submitting briefs limited to one or two detailed points. Sassone is to eliminate unnecessary redundancies and since responsible for final wording is attorney of record.

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SUMMARY OF ARGUMENT

The modern euthanasia debate may have begun about 1870. This decade has new wrinkles such as the "right of the comatose to be starved to death via the decision of a third person via substituted judgement". In spite of the new wrinkles and changes of terminology, the principles of the euthanasia debate remain the same. The original debate about one's right to terminate unwanted relatives goes back to Cain and Able. The historical view herein shows that any new right to kill is not likely to satisfy tomorrow's euthanasia supporters. Experience with abortion indicates a probability that any right to kill by cutting off nutrition and hydration in the present case will be extended under the pressure that will be exerted by then triumphant pro euthanasiasts. An ounce of

thoughtful historical analysis is worth a pound of other arguments to shed light on our probable future if the Court reverses. Yale Kamisar, Henry K Ransom Professor of Law, U of Michigan, Ann Arbor, argued against Glanville Williams thirty years ago [Some Non-Religious Views Against Proposed "Mercy Killing" Legislation] Minn L Rev., 42:969-1042(May), 1958 that euthanasia would be extended if we legalized a little bit of it [as is sought by appellants herein]. This brief is abstracted from part of that argument. Another brief [Right to Life League of Southern California] is abstracted from other arguments of Professor Kamisar without overlapping this brief. Kamisar's original footnotes have been omitted.

A LONG-RANGE VIEW OF EUTHANASIA

A. Voluntary v. Involuntary Euthanasia

Ever since the 1870's, when what was probably the first euthanasia debate of the modern era took place, most proponents of the movement-at least when they are pressed-have taken considerable pains to restrict the question to the plight of the unbearably suffering incurable who voluntarily seeks death while most of their opponents have striven equally hard to frame the issue in terms which would encompass certain involuntary situations as well, e.g., the "congenital idiots," the "permanently insane," and the senile.

Glanville Williams reflects the outward mood of many euthanasiasts when he scores those who insist on considering the question from a broader angle:

"The [English Society's] bill

[debated in the House of lords in 1936 and 1950] excluded any question of compulsory euthanasia, even for hopelessly defective infants. Unfortunately, a legislative proposal is not assured of success merely because it is worded in a studiously moderate and restrictive for. The method of attack by those who dislike the proposal, is to use the "thin edge of the wedge" argument ..."There is no proposal for reform on any topic, however conciliatory and moderate, that cannot be opposed by this dialectic."

Why was the bill "worded in a studiously moderate and restrictive form"? If it were done as a matter of principle, if it were done in recognition of the ethico-moral-legal "wall of separation" which stands between

voluntary and compulsory "mercy killings," much can be said for the euthanasiast's lament about the methods employed by the opposition. But if it were done as a matter of political expediency with great hopes and expectations of pushing through a second and less restrictive bill as soon as the first had sufficientlys educated public opinion, what standing do advocates of euthanasia have to attack the methods of the opposition?

In this regard the words and action of the euthanasiasts are not insignificant.

No sooner had the English Society been organized and a drive to attain "easy death" legislation launched than Dr. Harry Roberts, one of the most distinguished sympathizers of the movement, disclosed some basis for alarm

as to how far the momentum would carry:

"So far as its defined objects go, most informed people outside the Catholic Church will be in general sympathy with the new Society: but lovers of personal liberty may feel some of that suspicion which proved so well justified when the Eugenics movement was at its most enthusiastic height."

In the course of the discussion at the [1935] Royal Sanitary Institute Congress, two distinguished doctors urged the desirability of legalizing the painless destruction of "human mental monstrosities" in whom improvement is unattainable; and at the inaugural meeting of the Euthanasia Legislation Society, the Chairman of the Executive Committee said that

"...they were concerned today only with voluntary euthanasia; but, as public

opinion developed, and it became possible to form a truer estimate of the value of human life, further progress along preventive lines would be possible...The population was an ageing one, with a larger relative proportion of elderly persons-individuals who had reached a degenerative stage of life. Thus the total amount of suffering and the number of useless lives must increase.

We need to discriminate very carefully between facilitating the death of an individual at his own request and for his own relief, and the killing of an individual on the ground that, for the rest of us, such a course would be more economical or more agreeable than keeping him alive."

In the 1936 debate in the House of Lords, Lord Ponsonby of Shulbrede, who moved the second reading of the voluntary

euthanasia bill, described two appealing actual cases, one where a man drowned his four year old daughter "who had contracted tuberculosis and had developed gangrene in the face," another where a woman killed her mother who was suffering from "general paralysis of the insane." Both cases of course were of the compulsory variety of euthanasia. True, Lord Ponsonby readily admitted that these cases were not covered by the proposed bill, but the fact remains that they were the only specific cases he chose to describe.

In 1950, Lord Chorley once again called the voluntary euthanasia bill to the attention of the House of Lords. He was most articulate, if not too discreet, on excluding compulsory euthanasia cases from coverage:

"Another objection is that the Bill

does not go far enough, because it applies only to adults and does not apply to children who come into the world deaf, dumb and crippled, and who have a much better cause than those for whom the Bill provides. That may be so, but we must go step by step."

In 1938, two years after the English Society was organized and its bill had been introduced into the House of Lords, the Euthanasia Society of America was formed. At its first annual meeting the following year, it offered proposed euthanasia legislation:

"Infant imbeciles, hopelessly insane persons...and any person not requesting his own death would not come within the scope of the proposed act.

Charles E. Nixdorff, New York lawyer and treasurer of the society, who offered the bill for consideration, explained to

some of the members who desired to broaden the scope of the proposed law, that it was limited purposely to voluntary euthanasia because public opinion is not ready to accept the broader principle. He said, however, that the society hoped eventually to legalize the putting to death of nonvolunteers beyond the help of medical science."

About this time, apparently, the Society began to circulate literature in explanation and support of voluntary euthanasia, as follows:

"The American and English Euthanasia Societies, after careful consideration, have both decided that more will be accomplished by devoting their efforts at present to the measure which will probably encounter the least opposition, namely voluntary euthanasia. The public is readier to recognize the right to die

than the right to kill, even though the latter be in mercy. To take someone's life without his consent is a very different thing from granting him release from unnecessary suffering at his own express desire. The freedom of the individual is highly prized in democracies."

The American Society's own "Outline of the Euthanasia Movement in the United States and England" states in part:

"1941. A questionnaire was sent to all physicians of New York State asking (1) Are you in favor of legalizing voluntary euthanasia for incurable adult sufferers? (2) Are you in favor of legalizing euthanasia for congenital monstrosities, idiots and imbeciles? Because only one-third as many physicians answered "yes" to question 2 as to question 1, we decided that we would

limit our program to voluntary euthanasia."

At a meeting of the Society of Medical Jurisprudence held several weeks after the American Society voluntary euthanasia bill had been drafted, Dr. Foster Kennedy, newly elected president of the Society,

"...urged the legalizing of euthanasia primarily in cases of born defectives who are doomed to remain defective, rather than for normal persons who have become miserable through incurable illness [and scored the] absurd and misplaced sentimental kindness [that seeks to preserve the life of a] person who is not a person. If the law sought to restrict euthanasia to those who could speak out for it, and thus overlooked these creatures who cannot speak, the, I say as Dickens did, 'The

law's an ass.'"

As pointed out elsewhere, while president of the Society, Dr. Kennedy not only eloquently advocated involuntary euthanasia but strenuously opposed the voluntary variety. Is it any wonder that opponents of the movement do not always respect the voluntary-involuntary dichotomy?

At the same time that Dr. Kennedy was disseminating his "personal" view, Dr. A. L. Wolbarst, long a stalwart in the movement, was adhering much more closely to the party line. In a persuasive address to medical students published in a leading medical journal he pointed out that

"...a bill is now in preparation for introduction in the New York State Legislature authorizing the administration of euthanasia to incurable

sufferers on their own request [and stressed that] the advocates of voluntary euthanasia do not seek to impose it on any one who does not ask for it. It is intended as an act of mercy for those who need it and demand it."

What were Dr. Wolbarst's views before the English and American societies had been organized and substantial agreement reached as to the party platform? Four years earlier, in a debate on euthanasia, he stated:

"The question as usually submitted limits the discussion of legal euthanasia to those "incurables whose physical suffering is unbearable to themselves." That limitation is rather unfortunate, because the number of incurables within this category is actually and relatively extremely small. Very few incurables have or express the wish to die. however great

their physical suffering may be ...they prefer to live.

If legal euthanasia has a humane and merciful motivation, it seems to me the entire question should be considered from a broad angle. There are times when euthanasia is strongly indicated as an act of mercy even though the subject's suffering is not "unbearable to himself," as in the case of an imbecile.

It goes without saying that, in recently developed cases with a possibility of cure, euthanasia should not even be considered: but when insane or defective people have suffered mental incapacity and tortures of the mind for many years-forty-three years in a case of my personal knowledge-euthanasia certainly has proper field."

In his 1939 address, Dr. Wolbarst also quoted in full the stirring suicide

message of Charlotte Perkins Gilman,

"...described as one of the twelve greatest American women [who] had been in failing health for several years and chose self euthanasia rather than endure the pains of cancer."

He would have presented Mrs. Gilman's views more fully if he had quoted as well from her last article, left with her agent to be published after death, where she advocates euthanasia for "incurable invalids," "hopeless idiots," helpless paretics," and "certain grades of criminals." Citing with approval the experience of "practical Germany," Miss Gilman's article as asserted that

"...the dragging weight of the grossly unfit and dangerous could be lightened [by legalized euthanasia,] with great advantage to the normal and progressive. The millions spent in

restraining and maintaining social detritus should be available for the safeguarding and improving of better lives."

In 1950, the "mercy killings" perpetrated by Dr. Herman N. Sander on his cancer-stricken patient and by Miss Carol Ann Paight on her cancer-stricken father put the euthanasia question on page one. In the midst of the fervor over these cases, Dr. Clarence Cook Little, one of the leaders in the movement and a former president of the American Society, suggested specific safeguards for a law legalizing "mercy killings: for the "incurably ill but mentally fit" and for "mental defectives." The Reverend Charles Francis Potter, the founder and first president of the American Society hailed Dr. Sander's action as "morally right" and hence that which "should be legally

right." Shortly thereafter, at its annual meeting, the American Society "voted to continue support" of both Dr. Sander and Miss Paight. .

Now, one of the interesting, all but underplayed, features of these cases-and this was evident all along-was that both were involuntary "mercy killings." There was considerable conflict in the testimony at the Sander Trial as to whether or not the victim's husband had pleaded with the doctor to end her suffering, but nobody claimed that the victim herself had done such pleading. There was considerable evidence in the Paight case to the effect that the victim's daughter had a "cancer phobia," the cancer deaths of two aunts having left a deep mark on her, but nobody suggested that the victim had a "cancer phobia."

It is true that Mother Paight said approvingly of her "mercy killing" daughter that "she had the old Paight guts," but it is no less true that Father Paight had no opportunity to pass judgement on the question. He was asleep, still under the anesthetic of the exploratory operation which revealed the cancer in his stomach when his daughter, after having taken one practice shot in the woods, fired into his left temple. Is it not just possible that Father Paight would have preferred to have had the vaunted Paight intestinal fortitude channelled in other directions, e.g., by his daughter bearing to see him suffer?

The Sander and Paight cases amply demonstrate that to the press, the public, and many euthanasiasts, the killing of one who does not or cannot speak is no less a "mercy killing" than

the killing of one who asks for death. Indeed, the overwhelming majority of known or alleged "mercy killings" have occurred without the consent of the victim. If the Sander and Paight cases are a typical at all, they are so only in that the victims were not ill or retarded children, as in the Simpson, Brownhill and Long English cases and the Greenfield, Repouille, Noxon and Braunsdorf American cases.

These situations are all quite moving. So much so that two of the strongest presentations of the need for voluntary euthanasia, free copies of which may be obtained from the American Society, lead off with sympathetic discussions of the Brownhill and Greenfield cases. This, it need hardly be said, is not the way to honor the voluntary-involuntary boundary. Not the

way to ease the pressure to legalize at least this type of involuntary euthanasia as well if any changes in the broad area to be made at all.

Nor, it should be noted, is Williams free from criticism in this regard. In his discussion of "the present law," apparently a discussion of voluntary euthanasia, he cites only one case, Simpson, an involuntary situation. In his section on "the administration of the law" he describes only the Sander case and the "compassionate acquittal" of a man who drowned his four year old daughter, a sufferer of tuberculosis and gangrene of the face. Again, both are involuntary cases. for "some other" American "mercy killing" cases, Williams refers generally to an article by Helen Silving, but two of the three cases he seems to have in mind are likewise cases

of involuntary euthanasia.

That the press and general public are not alone in viewing an act as a "mercy killing," lack of consent on the part of the victim notwithstanding, is well evidenced by the recent deliberations of the Royal Commission on Capital Punishment. The Report itself described "mercy killings" as "for example, where a mother has killed her child or a husband has killed his wife from merciful motives of pity and humanity." The only specific proposal to exclude "mercy killings" from the category of murder discussed in the Report is a suggestion by the Society of Labour Lawyers which disregards the voluntary-involuntary distinction:

"If a person who has killed another person proves that he killed that person with the compassionate intention of saving him physical or mental suffering

he shall not be guilty of murder."

Another proposal, on by Hector Hughes, M.P., to the effect that only those who "maliciously" cause the death of another shall be guilty of murder, likewise treated the voluntary and involuntary "mercy killer" as one and the same.

Testimony before the Commission underscored the great appeal of the involuntary "mercy killings." Thus, Lord Goddard, the Lord Chief Justice, referred to the famous Brownhill case, which he himself had tried some fifteen years earlier, as "a dreadfully pathetic case." "The son," he pointed out, "was a hopeless imbecile, more than imbecile, a mindless idiot."

Mr. Justice Humphreys recalled "one case that was the most pathetic sight I ever saw," a case which literally had the

trial judge, Mr. Justice Hawkins, in tears. It involved a young father who smothered his infant child to death when he learned the child had contracted syphilis from the mother (whose morals turned out to be something less than represented) and would be blind for life. "That," Mr. Justice Humphreys told the Commission, "was a real "mercy killing."

The boldness and daring which characterizes most of Glanville Williams' book dims perceptibly when he comes to involuntary euthanasia proposals. As to the senile, he states:

"At present the problem has certainly no reached the degree of seriousness that would warrant an effort being made to change traditional attitudes toward the sanctity of life of the aged. Only the grimmest necessity could bring about a change that, however

cautious in its approach, would probably cause apprehension and deep distress to many people, and inflict a traumatic injury upon the accepted code of behavior built up by two thousand years of the Christian religion. It may be, however, that as the problem becomes more acute it will itself cause a reversal of generally accepted values."

To me, this passage is the most startling one in the book. On page 348 Williams invokes "traditional attitudes towards the sanctity of life" and the accepted code of behaviour built up by two thousand years of the Christian religion" to check the extension of euthanasia to the senile, but for 347 pages he had been merrily rolling along debunking both. Substitute "cancer victim" for "the aged" and Williams' passage is essentially the argument of

many of his opponents on the voluntary euthanasia question.

The unsupported comment that "the problem [of senility] has certainly not reached the degree of seriousness" to warrant euthanasia is also rather puzzling, particularly coming as it does after an observation by Williams on the immediately preceding page that

"...it is increasingly common for men and a women to reach an age of "second childishness and mere oblivion," with a loss of almost all adult faculties except that of digestion."

How "serious" does a problem have to be to warrant a change in these "traditional attitude"? If, as the statement seems to indicate, "seriousness" of a problem is to be determined numerically, the problem of the cancer victim does not appear to be

as substantial as the problem of the senile. For example, taking just the 95,837 first admissions to "public prolong-care hospitals" for mental diseases in the United States in 1955, 23,561- or one fourth-were cerebral arteriosclerosis or senile brain disease cases. I am not at all sure that there are 20,000 cancer victims per year who die unbearably painful deaths. Even if there were, I can not believe that among their ranks are some 20,000 per year who, when still in a rational state, so long for a quick and easy death that they would avail themselves of legal machinery for euthanasia.

If the problem of the incurable cancer victim "has reached the degree of seriousness that would warrant an effort being made to change traditional attitudes toward the sanctity of life,"

as Williams obviously thinks it has, then so has the problem of senility. In any event, the senility problem will undoubtedly soon reach even Williams' requisite degree of seriousness:

"A decision concerning the senile may have to be taken within the next twenty years. The number of old people are increasing by leaps and bounds. Pneumonia, "the old man' friend" is now checked by antibiotics. The effects of hardship, exposure, starvation and accident are now minimized. Where is this leading us?...What of the drooling, helpless, disorientated old man or the doubly incontinent old woman lying log-like in bed? Is it here that the real need for euthanasia exists?"

If as Williams indicates, "seriousness" of the problem is a major criterion for euthanatizing a category of

unfortunates, the sum total of mentally deficient persons would appear to warrant high priority, indeed.

When Williams turns to the plight of the "hopelessly defective infants," his characteristic vim and vigor are, as in the senility discussion, conspicuously absent:

"While the Euthanasia Society of England has never advocated this, the Euthanasia Society of America did include it in its original program. The proposal certainly escapes the chief objection to the similar proposal for senile dementia: it does not create a sense of insecurity in society, because infants cannot, like adults, feel anticipatory dread of being done to death if their condition should worsen. Moreover, the proposal receives some support on eugenic grounds, and more importantly on humanitarian grounds-both

on account of the parents, to whom the child will be a burden all their lives, and on account of the handicapped child itself. (It is not, however, proposed that any child should be destroyed against the wishes of its parents.) Finally, the legalization of euthanasia for handicapped children would bring the law into closer relation to its practical administration, because juries do not regard parental mercy killing as murder. For these various reasons the proposal to legalize humanitarian infanticide is put forward from time to time by individuals. They remain in a very small minority, and the proposal may at present be dismissed as politically insignificant."

It is understandable for a reformer to limit his present proposals for change to those with a real prospect of success. But it is hardly reassuring for Williams

to cite the fact that only "a very small minority" has urged euthanasia for "hopelessly defective infants" as the only reason for not pressing for such legislation now. If, as Williams sees it, the only advantage voluntary euthanasia has over the involuntary variety lies in the organized movements on its behalf, that advantage can readily be wiped out.

In any event, I do not think that such "a very small minority" has advocated "humanitarian infanticide." until the organization of the English and American societies led to a concentration on the voluntary type, and until the by-products of the Nazi euthanasia program somewhat embarrassed, if only temporarily, most proponents of involuntary euthanasia, about as many writer urged one type as another. Indeed, some euthanasiasts have taken

considerable pains to demonstrate the superiority of defective infant euthanasia over incurably ill euthanasia.

As for dismissing euthanasia of defective infants as "politically insignificant," the only poll that I know of which measured the public response to both types of euthanasia revealed that 45 percent favored euthanasia for defective infants under certain conditions while only 37.3 percent approved euthanasia for the incurably and painfully ill under any conditions. Furthermore, of those who favored the "mercy killing" cure for incurable adults, some 40 percent would require only family permission or medical board approval, but not the patient's permission.

Nor do I think it irrelevant that while public resistance caused Hitler to yield on the adult euthanasia front, the

killing of malformed and idiot children continued unhindered to the end of the war, the definition of "children" expanding all the while. Is it the embarrassing experience of the Nazi euthanasia program which has rendered destruction of defective infants presently "politically insignificant"? If so, is it any more of a jump from the incurably and painfully ill to the unorthodox political thinker than it is from the hopelessly defective infant to the same "unsavory character"? Or is it not so much that the euthanasiasts are troubled by the Nazi experience as it is that they are troubled that the public is troubled by the Nazi experience?

I read Williams' comments on defective infants for the proposition that there are some very good reasons for euthanatizing defective infants, but the

time is not yet ripe. When will it be? When will the proposal become politically significant? After a voluntary euthanasia law in on the books and public opinion is sufficiently "educated"?

Williams' reasons for not extending euthanasia-once we legalize it in the narrow "voluntary" area-to the senile and the defective are much less forceful and much less persuasive than his arguments for legalizing voluntary euthanasia in the first place. I regard this as another reason for not legalizing voluntary euthanasia in the first place.

B. The parade of Horrors

"Look when the messenger cometh, shut the door, and hold him fast at the door; is not the sound of his master's feet behind him?"

This is the "wedge principle," the "parade of horrors" objection,m if you will, to voluntary euthanasia. Glanville Williams' peremptory retort is:

"This use of the "wedge" objection evidently involves a particular determination as to the meaning of words, namely the words "if raised to a general line of conduct." The author supposes, or the sake of argument, that the merciful extinction of life in suffering patient is not in itself immoral. Still it is immoral, because if it were permitted this would admit "a most dangerous wedge that might eventually put all life in a precarious condition" It seems a sufficient reply to say that this type of reasoning could be used to condemn any act whatever, because there is no human conduct from which evil cannot be imagined to follow if it is persisted in

when some of the circumstances are changed. All moral questions involve the drawing of a line, but the "wedge principle" would make it impossible to draw a line, because the line would have to be pushed farther and farther back until all action became vetoed."

I agree with Williams that if a first step is "moral" it is moral wherever a second step may take us. The real point, however, the point that Williams sloughs, is that whether or not the first step is precarious, is perilous, is worth taking, rests in part on what the second step is likely to be.

It is true that the "wedge" objection can always be advanced, the horrors can always be paraded. But it is no less true that on some occasions the objection is much more valid than it is <u>on</u> to others. One reason why the "parade of horrors"

cannot be too lightly dismissed in this particular instance is that Miss Voluntary Euthanasia is not likely to be going it alone for very long. Many of her admirers, as I have endeavored to show in the preceding section, would be neither surprised nor distressed to see her joined by Miss Euthanatize the Congenital Idiots and Miss Euthanatize the Permanently Insane and Miss Euthanatize the Senile Dementia. And these lasses-whether or not they themselves constitute a "parade of horrors"-certainly make excellent majorette for such a parade:

"Some are proposing what is called euthanasia; at present only a proposal for killing those who are a nuisance to themselves; but soon to be applied to those who are a nuisance to other people."

[The more things change, the more they are the same. California passed the first US living will law. At the time it was passed, advocates in no way indicated it was imperfect. In the very next legislative session, the sponsor of the original living will law introduced legislation which did not pass which would have removed most of the safeguards of the original law. Chief Justice Burger, upon voting in 1973 for what became abortion on demand, in apparent good faith stated in a concurring opinion that it did not mean abortion on demand. The first abortion "reform" bills introduced had many safeguards. The last such law passed in New York legalized abortion on demand. California passed the second US abortion ALI law which took effect in 1968. In 1970, the sponsor of the original law introduced an abortion

on demand bill. The entire history of the anti sanctity of life movement in the US illustrates a continual use of a carefully selected "hard case" to destroy a tiny corner of the general rule portecting life, followed by a widening of the breach by an unlimited parade of exceptions. In the Netherlands, a tiny judicial exception has apparently become euthanasia on demand and not necessarily on demand of the soon to be deceased.]

Another reason why the "parade of horrors" argument cannot be too lightly dismissed in this particular instance, it seems to me, is that the parade has taken place in our time and the order of procession has been headed by the killing of the "incurables" and the "useless":

"Even before the Nazis took open charge in Germany, a propaganda barrage was directed against the traditional

compassionate nineteenth-century attitudes toward the chronically ill, and for the adoption of a utilitarian, Hegelian point of view... Lay opinion was not neglected in this campaign. Adults were propagandized by motion pictures,one of which, entitled "I Accuse," deals entirely with euthanasia. This film depicts the life history of a woman suffering from multiple sclerosis; in it her husband, a doctor, finally kills her to the accompaniment of soft piano music rendered by a sympathetic colleague in an adjoining room. Acceptance of this ideology was implanted even in the children. A widely used high school mathematics text...included problems stated in distorted terms of the cost caring for and rehabilitating the chronically sick and crippled. One of the problems asked, for instance, how many

new housing units could be built and how many marriage-allowance loans could be given to newly wedded couples for the amount of money it cost the state to care for "the crippled, the criminal and the insane..." The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to live. This attitude in its early stage concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from

which this entire trend of mind received its impetus was the attitude toward the non-rehabilitatable sick."

The apparent innocuousness of Germany's "small beginnings" is perhaps best shown by the fact that German Jews were at first excluded from the program. for it was originally conceived that "the blessing of euthanasia should be granted only to [true] Germans."

Relatively early in the German program, Pastor Braune, Chairman of the Executive Committee of the Domestic Welfare Council of the German Protestant Church, called for a halt to euthanasia measures

"...since they strike sharply at the moral foundations of the nation as a whole. The inviolability of human life is a pillar of any social order."

And the pastor raised the same question

which euthanasia opponents ask today, as well they might, considering the disinclination of many in the movement to stop at voluntary "mercy killings": Where do we, how do we, draw the line? The good pastor asked:

"How far is the destruction of socially unfit life to go? The mass methods used so far have quite evidently taken in many people who are to a considerable degree of sound mind...Is it intended to strike only at the utterly hopeless cases-the idiots and imbeciles? The instruction sheet, as already mentioned, also lists senile diseases. The latest decree by the same authorities requires that children with serious congenital disease and malformation of every kind be registered, to be collected and processed in special institutions. This necessarily gives rise to grave

apprehensions. Will a line be drawn at the tubercular? In the case of persons in custody by court order euthanasia measures have evidently already been initiated. Are other abnormal or antisocial persons likewise to be included? Where is the borderline? Who is abnormal, antisocial, hopelessly sick?"

Williams makes no attempt to distinguish or minimize the Nazi German experience. apparently he does not consider it worthy of mention in a euthanasia discussion. There are, however, a couple of obvious arguments by which the Nazi experience can be minimized.

One goes something like this: It is silly to worry about the prospects of a dictatorship utilizing euthanasia

"...as pretext for putting inconvenient citizens out of the way.

Dictatorships have no occasion for such subterfuges. The firing squad is less bother."

One reason why this counter argument is not too reassuring, however, if again I may be permitted to be so unkind as to meet speculation with a concrete example to the contrary, is that Nazi Germany had considerable occasion to use just such a subterfuge.

Thus, Dr. Leo Alexander observes:

"It is rather significant that the German people were considered by their Nazi leaders more ready to accept the exterminations of the sick than those for political reasons. It was for that reason that the first exterminations of the latter group were carried out under the guise of sickness. So-called "psychiatric experts" were dispatched to survey the inmates of camps with the specific order

to pick out members of racial minorities and political offenders from occupied territories and to dispatch them to killing centers with specially made diagnoses such as that of "inveterate German hater: applied to a number of prisoners who had been active in the Czech underground.

A large number of those marked for death for political or racial reasons were made available for 'medical experiments involving the use of involuntary human subjects.'"

The "hunting season" in Germany officially opened when Hitler signed, on his own letterhead, a secret order dated September 1, 1939, which read:

"Reichsleiter Bouhler and Dr. Brandt, M.D., are charged with the responsibility of enlarging the authority of certain physicians, to be designated by name, in

such a manner that persons who, according to human judgement, are incurable can, upon a more careful diagnosis of their condition of sickness, be accorded a mercy death."

Physicians asked to participate in the program were told that the secrecy of the order was designed to prevent patients from becoming "too agitated" and that it was in keeping with the policy of not publicizing home front measures in time of war.

About the same time that aged patients in some hospitals were being given the "mercy" treatment, the Gestapo was also "systematically putting to death the mentally deficient population of the Reich.

The courageous and successful refusal by a Protestant pastor to deliver up certain cases from his asylum well

demonstrates that even the most totalitarian governments are not always indifferent to the feeling of the people, that they do not always feel free to resort to the firing squad. Indeed, vigorous protests by other ecclesiastical personalities and some physicians, numerous requests of various public prosecutors for investigation of the circumstances surrounding the mysterious passing away of relatives, and a generally aroused public opinion finally caused Hitler to yield, if only temporarily, and in August of 1941 he verbally ordered the discontinuance of the adult euthanasia program. Special gas chambers in Hadamar and other institutions were dismantled and shipped to the East for much more extensive use of Polish Jews.

Perhaps it should be noted, too, that

even dictatorships fall prey to the inertia of big government:

"It is ...interesting that there was so much talk against euthanasia in certain ares of Germany, particularly in the region of Wiesbaden, that Hitler in 1943 asked Himmler to stop it. But, it had gained so much impetus by 1943 and was such an easy way in crowded concentration camps to get rid of undesirables and make room for newcomers, that it could not be stopped. The wind had become a whirlwind."

Another obvious argument is that it just can't happen here. I hope not. I think not.

But then, neither did I think that tens of thousands of perfectly loyal native-born Americans would be herded into prison camps without proffer of charges and held there for many months,

even years, because they were of "Japanese blood" and, although the general who required these measures emitted considerable ignorance and bigotry, his so-called military judgment would be largely sustained by the highest court of the land. The Japanese American experience of World War II undoubtedly fell somewhat short of first-class Nazi tactics, but we were getting warm. I venture to say it would not be too difficult to find American citizens of Japanese descent, who would maintain we were getting very warm indeed.

In this regard some of Justice Jackson's observations in his Korematsu dissent seem quite pertinent:

"All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its

logic" [Nature of the Judicial Process, p.51.] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in Hirabayashi v. United States, 320 U.S. 81, when we sustained these order in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that

being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do...However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mold and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is

said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know."

It can't happen here. Well, maybe it cannot, but no small part of our Constitution and no small number of our supreme Court opinions stem from the fear that it can happen here unless we darn well make sure that it does not by adamantly holding the line, by swiftly snuffing out what are or might be small beginnings of what we do not want to happen here. To flick off, as Professor Williams does, the fears about legalized euthanasia as so much nonsense, as a

chimerical "parade of horrors," is to sweep away much of the ground on which all our civil liberties rest.

Boyd, the landmark search and seizure case which paved the way for the federal rule of exclusion, a doctrine which now prevails in over twenty state courts as well, set the mood of our day in treating those accused of crime:

"It may be that it is the obnoxious thing in its mildest and lest repulsive form; but illegitimate & unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis..."

Recent years have seen the Supreme

Court sharply divided on search and seizure questions. The differences, however, have been over application, not over the Boyd-Weeks "wedge principle"; not over the view, as the great Learned Hand, hardly the frightened spinster type, put it in an oft-quoted phrase,

"that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

And when the dissenter have felt compelled to reiterate the reasons for the principle, lest its force be diminished by the failure to apply it in the particular case, and thy have groped for the most powerful arguments in its behalf, where have they turned, what have they done? Why, they have employed the

very arguments Glanville Williams dismisses so contemptuously. They have cited the Nazi experience. They have talked of the police state, the knock at the door, the suppression of political opposition under the guise of sedition. They have trotted out,if you will, the "parade of horrors."

The lengths to which the Court will go in applying the "wedge principle" in the First Amendment area is well demonstrated by instances where those who have labeled Jews "slimy scum" and likened them to "bedbugs" and "snakes" or who have denounced them "as all the garbage that ...should have been burnt in the incinerators" have been sheltered by the Court so that freedom of speech and religion would not be impaired. Perhaps the supreme example is the Barnette case.

There, in striking down the

compulsory flag salute and pledge, Justice Jackson took the position that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." "The First Amendment," he pointed out, "was designed to avoid these ends by avoiding these beginnings." Justices Black and Douglas kept in step in their concurring opinion by advancing the view that "the ceremonial, when enforced against conscientious objectors...is a handy implement for disguised religious persecution."

What were these pernicious "beginnings" again? What was this danger-laden ceremonial again? Why, requiring public school pupils "to participate in the salute honoring the

Nation represented by the Flag." Talk about "parades of horror"! This one is an extravaganza against which anything euthanasia opponents can muster is drab and shabby by comparison. After all, whatever else Williams and his allies make "mercy killings" out to be, these beginnings are not "patriotic ceremonies."

The point need not be labor. If the prospects of the police state, the knock on Everyman's door, and widespread political persecution are legitimate considerations when we enter "opium smoking dens," when we deal with "not very nice people" and "sordid little cases" then why should the prospects of the police state and the systematic extermination of certain political or racial minorities be taken any less seriously when we enter the sickroom or

the mental institution, when we deal with not very healthy or not very useful people, when we discuss "euthanasia" under whatever trade name?

If freeing some rapist or murderer is not too great a price to pay for the "sanctity of the home," then why is allowing some cancer victim to suffer a little longer too great a price to pay for the "sanctity of life:? If the sheltering of purveyors of "hateful and hate-stirring attacks on races and faiths" may be justified in the name of a transcendent principle, then why may not postponing the death of the suffering "incurable" be similarly justified?

A FINAL REFLECTION

There have been and there will continue to be compelling circumstances when a doctor or relative or friend will violate The Law On The Books and, more

often than not, receive protection from The Law In Action. But this is not to deny that there are other occasions when The Law On The Books operates to stay the hand of all concerned, among them situations were the patient is in fact (1) presently incurable, (2) beyond the aid of any respite which may come along in his life expectancy, suffering (3) intolerable and (4) unmitigable pain and of a (5) fixed and (6) rational desire to die. That any euthanasia program may only be the opening wedge for far more objectionable practices, and that even within the bounds of a "voluntary" plan such as Williams' the incidence of mistake or abuse is likely to be substantial, are not much solace to one in the above plight.

It may be conceded that in a narrow sense it is an "evil" for such a patient

to have to continue to suffer-if only for a little while. But in a narrow sense, long-term sentences and capital punishment are "evils," too. If we can justify the infliction of imprisonment and death by the state "on the ground of the social interests to be protected" then surely we can similarly justify the postponement of death by the state. The objection that the individual is thereby treated not as an "end" in himself but only as a "means" to further the common good was, I think, aptly disposed of by Holmes long ago. "If a man lives in society, he is likely to find himself so treated."

CONCLUSION

A reversal will only be the first step.

Respectfully submitted, ROBERT L SASSONE
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NO 88-1503
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L AND JOYCE CRUZAN
Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

v.

THAD C. McCANSE, GUARDIAN AD LITEM,
Respondent.

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on
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Lawrence D Sassone, Notary Public